

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

ORIGINAL

*To be argued by:
Charles F. McGowan*

77-7158

United States Court of Appeals

FOR THE SECOND CIRCUIT

KATHLEEN G. O'GEE,

Plaintiff-Appellee,

—against—

DOBBS HOUSES, INC.,

*Defendant and Third Party
Plaintiff-Appellant,*

—against—

UNITED AIR LINES, INC.,

Third Party Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLEE

LIPSIG, SULLIVAN, MOLLEN & LIAPAKIS, P.C.

Attorneys for Plaintiff-Appellee

100 Church Street

New York, New York 10038

PAMELA ANAGNOS LIAPAKIS,

Of Counsel

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
THE DISPOSITION BELOW	2
QUESTIONS PRESENTED	3
COUNTER-STATEMENT OF THE EVIDENCE	4
Preliminary	4
Plaintiff's status and duties aboard the aircraft	4
The aircraft	5
The mode of installing the cold buffet aboard the plane	6
Events preceding the accident	8
The accident	9
POINT I—The judgment appealed from should be affirmed. The evidence of negligence presented questions of fact for the jury, the jury's verdict is amply sustained by the evidence, and the charge was correct in all respects	10
Preliminary	10
The duty owed by Dobbs	11
Dobbs' breach of that duty	12
The Court properly charged the emergency doc- trine	13
POINT II—The amount of the verdict reflects a care- ful and correct consideration of the evidence by the jury. The verdict cannot be considered ex- cessive by any fair standard	16

	PAGE
Preliminary	16
Plaintiff's health preceding the accident	16
Events following the accident	17
Commencement of medical treatment by private physicians	17
Plaintiff's attempt to return to work	18
Plaintiff's further medical treatment	18
Events subsequent to the operation	19
Dr. Koven's testimony	20
POINT III—The Court correctly allowed Dr. Koven to testify as to what plaintiff had told him con- cerning her medical history for the purpose of using that information, as well as the physical examination he conducted, to express his opinions	23
CONCLUSION	24

Cases Cited

Amaro v. City of New York, 40 N.Y.2d 30	14
Badders Clothing Co. v. Burnham-Munger-Roots D.G. Co., 228 F. 470 (8th Cir. 1915)	3
Baksi v. Wallman, 271 App. Div. 422, aff'd. 297 N.Y. 456	7
Barker v. Parnossa, 39 N.Y.2d 926	12
Basham v. Pennsylvania R. Co., 372 U.S. 699	10
Batchkowsky v. Penn Cent. Co., 525 F.2d 1121 (2d Cir. 1975)	21

TABLE OF CONTENTS

iii

	PAGE
Cagle v. Atchley, 127 Ga. App. 668, 194 S.E.2d 598 ..	12
Carney v. Buyea, 271 App. Div. 338	14
Estes v. Town of Big Flats, Chemung County, 41 A.D.2d 681	15
Ferrari v. Moore-McCormack Lines, Inc., 294 F. Supp. 1366	21, 22
Georgia Power Co. v. Bell, 43 Ga. App. 559, 159 S.E. 589	12, 14
Gordon v. Gordon, 133 Ga. App. 520, 211 S.E.2d 374	14
Griffith v. Chevrolet Motor Division, 105 Ga. App. 588, 125 S.E.2d 525	11
Kalinowski v. Truck Equipment Co. Inc., 237 App. Div. 472	11, 12
Korte v. New York, N.H. & H.R. Co., 191 F.2d 86 (2d Cir. 1951)	7, 10
Lavender v. Kurn, 327 U.S. 645	10, 11
Lebrecht v. Bethlehem Steel Corporation, 402 F.2d 585 (2d Cir. 1968)	10, 11
Lewis v. Harry White Ford, Inc., 129 Ga. App. 318, 199 S.E.2d 599	13
Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036 (2d Cir. 1976)	4, 11
Milkman v. Lissak, 126 F.2d 204 (2d Cir. 1942)	10
Milton Bradley Co. of Ga. v. Cooper, 79 Ga. App. 302, 53 S.E.2d 761	13
Owen v. Rochester-Penfield Bus Co., 304 N.Y. 457 ..	4
Pollard v. Weeks, 60 Ga. App. 664, 4 S.E.2d 722	14
Powers v. Pate, 107 Ga. App. 25, 129 S.E.2d 193	12

	PAGE
Rossman v. LaGrega, 28 N.Y.2d 300	15
Rowe v. Pennsylvania Greyhound Lines, 231 F.2d 922 (2d Cir. 1956)	3, 10
Rowlands v. Parks, 2 N.Y.2d 64	14
Sanders v. Int'l Ass'n. of Bridge etc., 546 F.2d 879 ..	3
Southern R. Co. v. Lunsford, 57 Ga. App. 53, 194 S.E. 602	12
Spett v. President Monroe Bldg. & Mfg. Corp., 19 N.Y.2d 203	12
Van Campen v. Cram, 30 A.D.2d 541	7
Wagner v. International Ry. Co., 232 N.Y. 176	14
Ware v. Alston, 112 Ga. App. 627, 145 S.E.2d 721	14, 15
Willis v. Young Men's Christian Ass'n. of Amster- dam, 28 N.Y.2d 375	13
Wragge v. Lizza Asphalt Construction Co., 17 N.Y.2d 313	12

Rules Cited

Federal Rules of Appellate Procedure:

28 (a)(2)	3
-----------------	---

Federal Rules of Civil Procedure:

36	7
----------	---

Federal Rules of Evidence:

803(4)	23
805	23

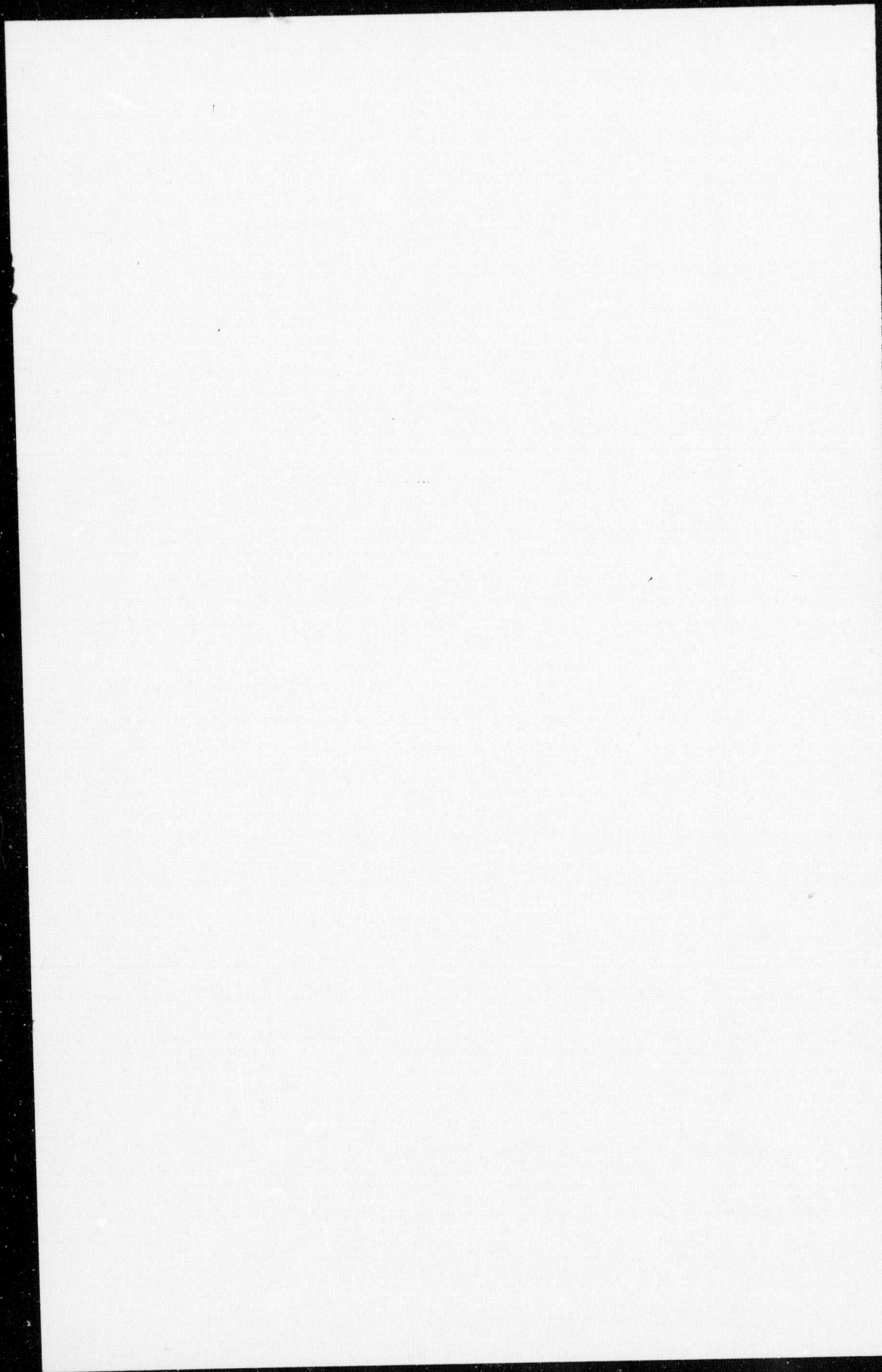
Other Authorities Cited

21 N.Y. Jur.:

Sec. 326, p. 459	7
------------------------	---

Restatement 2d, Conflict of Laws:

Sec. 133	3
Sec. 134	3
Sec. 135	3



United States Court of Appeals
FOR THE SECOND CIRCUIT

KATHLEEN G. O'GEE,

Plaintiff-Appellee,

—against—

DOBBS HOUSES, INC.,

*Defendant and Third Party
Plaintiff-Appellant,*

—against—

UNITED AIR LINES, INC.,

Third Party Defendant-Appellee.

BRIEF FOR PLAINTIFF-APPELLEE

Preliminary Statement

This is an action to recover damages for personal injuries sustained on April 23, 1972 by the then 23 year old plaintiff when suddenly confronted with, and instinctively reacting to, a hazardous condition while performing her duties as senior stewardess aboard a United Air Lines plane which had just taken off from the Atlanta,

Georgia airport. The basis of federal jurisdiction is diversity.

More specifically, plaintiff sustained a herniated (slipped) disc, causing the loss of more than a year's work and necessitating a laminectomy, when she attempted to push back into place a cold food buffet that had slid two feet out of place in the forward galley after take-off and thereby blocked access to an emergency door exit. The type of cold food buffet compartment involved is shown in photographs at pages 552a and 553a of the joint appendix. Two employees of the caterer Dobbs Houses, Inc. (hereinafter Dobbs) who had brought the buffet aboard the plane negligently failed to lock it into place by the requisite manual (by foot) depression of two levers.

It should be noted at the outset that a "[s]afety and training" employee (Ralph Maloch) of defendant Dobbs testified unequivocally that the protrudent buffet constituted a twofold "hazardous condition" (393a, 435a-436a)*, of which more later.

Plaintiff sued the caterer Dobbs who in turn impleaded United Air Lines (hereinafter United) on the theory that the protrusion of the buffet was due to defective equipment for which United would allegedly be responsible.

The Disposition Below

Following a trial before Hon. Jack B. Weinstein and a jury in the United States District Court for the Eastern District of New York, the jury rendered a special verdict that found defendant Dobbs to be solely at fault and awarded plaintiff \$170,000 (511a). Judge Weinstein de-

* Unless otherwise indicated, parenthetical references are to pages of the joint appendix.

nied post-verdict motions by defendant Dobbs to set aside the verdict on liability as against the evidence and on damages as excessive (514a).

Questions Presented

1. Did the evidence sustain the jury's finding that defendant Dobbs was solely negligent?
2. Did the evidence sustain the jury's finding that the accident was the proximate cause of plaintiff's injuries?
3. Did the evidence warrant a charge on the emergency doctrine?
4. Did the evidence support the jury's finding on damages?

We submit that each of those questions should be answered in the affirmative.

Brief comment is warranted on the *lex loci delicti*. The Court below ruled, over defendant Dobb's objection, that Georgia law controlled on matters of substantive law (cf. *Rowe v. Pennsylvania Greyhound Lines*, 231 F.2d 922, 924 (2d Cir. 1956); Restatement 2d, Conflict of Laws, §§133-5). Dobbs has not expressly challenged that ruling on this appeal and, thus, must be deemed to have acquiesced therein (Rule 28 [a][2], Federal Rules of Appellate Procedure; cf. *Sanders v. Int'l Ass'n. of Bridge etc.*, 546 F.2d 879, 882; *Badders Clothing Co. v. Burnham-Munder-Roots D.G. Co.*, 228 F. 470, 475-6 (8th Cir. 1915)).

In any event, the point becomes academic because, as the decisions hereinafter cited will demonstrate, the relevant substantive law of New York and Georgia is virtually identical.

Counter-Statement of the Evidence

Preliminary

In its "Statement of Relevant Facts" defendant Dobbs has ignored the fundamental appellate precept that plaintiff as appellee is entitled to the most favorable view of the evidence, including all reasonable inferences that may be drawn therefrom (*Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir. 1976); *Owen v. Rochester-Penfield Bus Co.*, 304 N.Y. 457, 459). In addition, Dobbs has ignored and/or underplayed other pertinent evidence on which the jury was justified in finding for plaintiff. Accordingly, we are compelled to present this counter-statement of the evidence.

The following recitation pertains to liability only. To avoid unnecessary repetition, the evidence pertaining to damages will only be discussed in Point II, *infra*.

Plaintiff's status and duties aboard the aircraft

Plaintiff, employed as a United flight attendant (stewardess) since April, 1969, was assigned on April 23, 1972 to an Atlanta-New York flight aboard a Boeing Stretch 727 (8a-9a). She was the senior attendant in charge of the other three stewardesses assigned to the flight (9a-10a).

Her duties included, among other things, supervision of boarding, services and the other stewardesses (10a, 133a). She also had to ascertain before take-off that the proper items had been put aboard by the caterer before take-off (213a, 292a-293a). However, she had never received any training as to the mechanics of how the buffet compartments were locked into place and secured by the caterer (228a)—that being the caterer's responsibility (322a).

Sharon L. Schweizer, who had been an instructor from 1967 to 1971 at United's Training Center for flight attendants, testified on a deposition that attendants were not instructed during training as to the mechanics of locking buffet compartments nor what they should do in the event a compartment came loose (287a, 294a, 297a, 303a, 304a, 307a). She testified that it was left to an attendant's own discretion and judgment whether she would attempt to rectify the situation herself or seek help from the cockpit (305a-307a) and that attendants only had "to seek assistance from the cockpit when they felt it was necessary" (308a). She asserted flatly that it was defendant Dobbs' responsibility on this occasion to see that the cold buffet compartments were "locked and secured in place" (322a).

Plaintiff had been instructed in safety aboard aircraft and knew that a protruding buffet compartment that blocked an emergency exit door in the galley constituted a safety hazard (136a-137a). Ralph Maloch, a "safety and training" employee of defendant Dobbs, squarely bore out her conclusion when he testified that a protrudent buffet would constitute a twofold "hazardous condition", viz., (1) that it would block the galley emergency door exit and (2) a passenger might have injured himself if he were to enter the galley while the buffet was protruding (435a-436a).

The aircraft

A diagram of a Boeing Stretch 727 appears at page 549a of the joint appendix. The galley here involved was located in the right front portion of the plane about 3 or 4 feet diagonally across from the left front passenger door (10a, 12a, 327a, 329a). Once buffet and oven units were inserted, the galley measured about 3½ feet long, 4 feet wide and 7 feet high (11a, 328a).

The cold food buffet consisted of a four drawer compartment in the forward section of the galley (224a, 328a-329a, 552a, 553a). The hot food buffet units were in the galley's aft section (329a, 551a). When loaded with food, the entire buffet unit weighed between five and eight hundred pounds (142a, 372a).

There was an emergency exit door at the right side of the galley (12a, 552a, 554a). There were doors on the galley next to the passenger aisle which were customarily kept open when caterers were installing the buffets, were closed while passengers were boarding so that they would not wander into the area, and were reopened after all passengers were boarded so that the galley emergency exit door would be readily accessible (131a-132a, 134a-135a).

The mode of installing the cold buffet aboard the plane

In order to establish the method by which the cold food buffet was to be correctly installed in the galley, plaintiff's counsel read in the deposition of John S. Griffiths who then, and for the past seven and a half years, had been employed by United as an aircraft engineer (323a). For the previous five and a half years his job entailed, *inter alia*, "the design of galley components" (323a). He was fully familiar with the galley components of the Stretch 727 used by United on the day in question (326a).

He testified that the cold food buffet was first assembled in a flight kitchen, placed in buffet units which were then closed up, and brought to the plane on a truck on a small four caster dolly (330a). The cold food buffet is then transferred onto tracks on the galley floor and pushed over the rails (331a-333a). He stated that the buffet is then supposed to be secured by a locking latch on each

rail that engages the bottom of the buffet (333a-334a). He described those latches as "foot type levers" (336a), i.e., "operated by a foot action of the ramp serviceman or whoever is loading the buffet" (335a).

He explained that the levers would secure the cold food buffet when put into a "down position" (337a), that "It's necessary to activate the lever" to assure a "locking arrangement" lest "It could roll out * * *" (351a).

Concededly, defendant adduced conflicting testimony through two of Dobbs' employees that the levers were supposed to operate automatically (374a, 376a, 402a-404a).^{*} However, that conflicting testimony simply gave rise to a pure question of fact for the jury.

Contrary to defendant Dobbs' implicit contention (Dobbs' Br., pp. 5-6, 8, 17-18), United's admission, in response to Dobbs' demand under Rule 36 of the Federal Rules of Civil Procedure, that the cold food buffet locked into the galley automatically did not "conclusively establish" (Appellant's Br., pp. 17-18) such to be the fact as against plaintiff in light of the contravening evidence adduced by plaintiff (333a-337a, 351a). United's admission was not binding on plaintiff (cf. *Baksi v. Wallman*, 271 App. Div. 422, 426, aff'd. 297 N.Y. 456; *Van Campen v. Cram*, 30 A.D.2d 541, 542; 21 N.Y. Jur. §326, p. 459) and did not render inapplicable the fundamental precept that the jury is free to consider all evidence in a case and to disbelieve whatever facts are inconsistent with its conclusion (*Korte v. New York, N.H. & H.R. Co.*, 191 F.2d 86, 88 (2d Cir. 1951)).

^{*} It is noteworthy that the combined testimony of those two employees revealed that Dobbs' employees were aware that United had issued a service manual binding on them (378a, 446a) requiring a visual check to see that the two cold buffet levers and the two hot buffet levers were "down" (438a, 441a, 444a) and that the purpose of that check was "to avoid a situation where the handle ends were up, which would allow for that buffet to come sliding out" (446a).

Events preceding the accident

On the morning of April 23, 1972 two of Dobbs' employees (neither of whom Dobbs called as a witness) boarded the plane through the galley emergency door to install the cold food buffet (11a, 12a, 13a-14a, 397a-398a). They were late in doing so that day (131a). The boarding of passengers awaited the departure of Dobbs' employees (11a-12a, 131a).

Plaintiff was sitting in a passenger seat two or three feet away from the galley watching Dobbs' employees install the buffet, which operation took less than five minutes (14a, 130a-131a, 207a-208a). After they had departed plaintiff proceeded to check the galley to ascertain that the proper supplies had been put aboard (213a, 215a-216a). At that juncture the cold food buffet was not protruding and plaintiff noticed nothing wrong (212a, 214a). However, plaintiff did nothing more in the galley at that time since Dobbs had loaded the buffet late that day (131a).

The stewardesses then closed the galley doors next to the aisle in order that passengers would not during boarding mistakenly go into the buffet (131a-132a). The passengers were boarded after which the galley doors were reopened prior to take-off so that the galley emergency exit door would be accessible (131a, 134a-135a, 221a).

The doors to the galley were under plaintiff's observation and no passenger or any member of the plane's crew, including stewardesses, entered the galley after the last passenger was boarded (133a-134a).

After a safety announcement was given to the passengers, plaintiff sat in a jump seat that afforded her an unobstructed view of the galley (135a). She was the first one to enter the galley once the plane was aloft (135a-136a).

The accident

Plaintiff went into the galley after the plane was aloft about five minutes although still at an upward angle (141a, 219a, 222a). She then saw that a cold food buffet "had slid out about two feet", thereby blocking the galley emergency exit door "about halfway" (136a, 222a). Cognizant from her aircraft safety training that the protruding buffet constituted a safety hazard because passengers would have been denied access to the emergency door if anything untoward occurred during the flight and also because a passenger might be injured by it (136a-137a), her "automatic reaction" was to try to push it back into place (223a).

She placed her two hands on the buffet and kept both feet on the floor (138a, 141a). As she first attempted to push it at that angle, she "felt something pull in [her] back" (141a, 224a-225a). That effort having proved unsuccessful, she placed her left foot on the oven behind her to get better leverage and pushed "upwards" (141a, 225a-226a). This time she felt a "sharper" pain in the back (141a, 226a). She then requested help from another stewardess who had previously been busy but their combined effort also proved fruitless (142a, 225a, 228a).

The other stewardess then went to the cockpit to see if the third officer (engineer) could help them. He came to the galley and tried to push the buffet into place himself but to no avail. He then shook it from side to side to see if it were on the track whereupon the three of them pushed the buffet and were finally able to slide it into place (143a, 229a). Fifteen minutes had elapsed between the discovery of the protruding buffet and rectification of the problem (230a). The buffet remained in place during the balance of the flight (143a). During the course of the flight plaintiff

told the engineer and another stewardess that something had happened to her back (144a).

As discussed in detail in Point II, *infra*, plaintiff had sustained a herniated disc.

POINT I

The judgment appealed from should be affirmed. The evidence of negligence presented questions of fact for the jury, the jury's verdict is amply sustained by the evidence, and the charge was correct in all respects.

Preliminary

Defendant Dobbs' main thrust in attempting to discredit the jury verdict on liability is a tacit request that this Court believe the evidence favorable to Dobbs and disregard the evidence favorable to plaintiff. That tack ignores the fundamental principles that:

(1) it was for the jury to choose what portions of the evidence it accepted, what portions it rejected, and what inferences it drew therefrom; the jury was not required to accept one version and reject the other but was free to consider all the evidence in the case (*Lavender v. Kurn*, 327 U.S. 645, 653; *Korte v. New York, N.H. & H.R. Co.*, 191 F.2d 86, 88 (2d Cir. 1951));

(2) both the credibility and accuracy of the witnesses (*Rowe v. Pennsylvania Greyhound Lines*, 231 F.2d 922, 924 (2d Cir. 1956); *Milkman v. Lissak*, 126 F.2d 204, 205 (2d Cir. 1942)) and the ultimate resolution of any conflict in the evidence was exclusively for the jury (*Basham v. Pennsylvania R. Co.*, 372 U.S. 699, 700-1; *Lebrecht v. Bethlehem Steel Corporation*, 402 F.2d 585, 589 (2d Cir. 1968));

(3) plaintiff as appellee is entitled to the benefit of the most favorable inferences that may reasonably be drawn from the evidence (*Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir. 1976); and

(4) where conflicting inferences can be drawn from the evidence, a question of fact is presented for the jury (*Lavender v. Kurn*, 327 U.S. 645, 652-3; *Lebrecht v. Bethlehem Steel Corp.*, 402 F.2d 585, 589 (2d Cir. 1968)).

We respectfully submit that application of those principles to the evidence adduced on the trial mandates an affirmance of the judgment.

The duty owed by Dobbs

The combined testimony of Dobbs' general manager for catering (James Bridges) at the Atlanta airport on the day in question, Dobbs' "safety and training" employee (Ralph Maloch), and United's aircraft engineer (John Griffiths), established beyond peradventure that it was Dobbs' duty to install the cold food buffet in the galley in such manner that it would not slide out (330a-337a, 351a, 370a-371a, 374a, 375a-378a, 386a, 393a, 395a, 399a-404a, 446a). The fact that such was Dobbs' duty is further borne out by the undisputed evidence that two of Dobbs' employees boarded the plane and did in fact install the cold food buffet in the galley (11a-14a, 130a-131a, 207a-208a, 397a-398a).

It is fundamental that one who renders a service to another is under a duty to exercise reasonable care in doing so and that the party rendering the service may be held liable to anyone who may foreseeably be expected to be injured as a result of that negligence (cf. *Griffith v. Chevrolet Motor Division*, 105 Ga. App. 588, 125 S.E.2d 525; *Kalinowski v. Truck Equipment Co. Inc.*, 237 App.

Div. 472). We contend that the evidence fully supports the jury's verdict that Dobbs breached its duty as a direct, foreseeable consequence of which plaintiff was injured.

Dobbs' breach of that duty

The evidence showed that at the time of take-off the cold food buffet was not protruding (212a-214a), that within five minutes after take-off the buffet had slid out about two feet (141a, 219a, 222a) and that no one had entered the galley after take-off (133a-136a).

That circumstantial evidence was sufficient to permit a reasonable inference that Dobbs' employees had not properly locked the buffet into place during installation, even though the evidence did not necessarily negative the existence of remote possibilities that the injury was not caused by the defendant Dobbs or that the defendant was not negligent. It was enough that plaintiff showed facts from which the negligence of Dobbs could be reasonably inferred (*Cagle v. Atchley*, 127 Ga. App. 668, 194 S.E.2d 598, 603; *Spett v. President Monroe Bldg. & Mfg. Corp.*, 19 N.Y.2d 203, 205). The issue was one for the jury (*Powers v. Pate*, 107 Ga. App. 25, 27, 129 S.E.2d 193, 195; *Wragge v. Lizza Asphalt Construction Co.*, 17 N.Y.2d 313, 319).

Similarly, the issues of proximate cause and foreseeability were for the jury (*Southern R. Co. v. Lunsford*, 57 Ga. App. 53, 62, 194 S.E. 602, 607; *Georgia Power Co. v. Bell*, 43 Ga. App. 559, 563, 159 S.E. 589, 591; *Barker v. Parnossa*, 39 N.Y.2d 926). It was clearly within the jury's province to find that Dobbs' employees should have foreseen that a failure to secure the buffet would, as in fact it did, result in a blocking of the emergency exit door, thereby necessitating prompt action on the part of an attendant to rectify that hazardous condition by attempting to push that heavy buffet back into its proper place with a resultant injury of the type here sustained.

As stated in *Willis v. Young Men's Christian Ass'n. of Amsterdam*, 28 N.Y.2d 375, 379: "The need for care may be such as to bring remote consequences within the frame of responsibility * * *." The Georgia courts have similarly held that to hold a defendant liable for negligence, it is not necessary that defendant should have been able to anticipate the particular consequences which ensued. It is sufficient if in ordinary prudence defendant might have foreseen that some injury would result from its act or omission or that consequences of a generally injurious nature might result (*Lewis v. Harry White Ford, Inc.*, 129 Ga. App. 318, 320, 199 S.E.2d 599, 602; *Milton Bradley Co. of Ga. v. Cooper*, 79 Ga. App. 302, 307, 53 S.E.2d 761, 765).

Viewed in light of those principles, the evidence fully supports the jury's verdict that Dobbs' negligence created the condition which foreseeably resulted in plaintiff's injury.

**The Court properly charged
the emergency doctrine**

The Court charged as follows (496a):

"In this regard [contributory negligence], you may consider the fact that a person who is suddenly confronted by an unforeseen condition, if it's not brought about by her own negligence, and which she reasonably believes to be dangerous, may not be charged with negligence if she acts as a reasonably prudent person would act under the same circumstances, and this is so even if it appears afterwards that she did not take the safest course or exercise her best judgment."

That charge was an exact statement of the emergency doctrine as interpreted both by the courts of Georgia and

New York (*Gordon v. Gordon*, 133 Ga. App. 520, 524, 211 S.E.2d 374, 378; *Pollard v. Weeks*, 60 Ga. App. 664, 672 4 S.E.2d 722, 728; *Georgia Power Co. v. Bell*, 43 Ga. App. 559, 159 S.E. 589 591-2; *Rowlands v. Parks*, 2 N.Y.2d 64, 67; *Amaro v. City of New York*, 40 N.Y.2d 30, 36).

Like New York, the Georgia courts have ruled that the question whether an emergency existed or not is one for the jury (*Gordon v. Gordon*, 133 Ga. App. 523-4, 211 S.E. 2d 374, 378; *Ware v. Alston*, 112 Ga. App. 627, 630, 145 S.E.2d 721, 725; *Wagner v. International Ry. Co.*, 232 N.Y. 176, 180; *Charney v. Buyea*, 271 App. Div. 338, 342).

Dobbs advances the unrealistic argument at pages 28 and 29 of its brief that no emergency existed when plaintiff discovered the protruding buffet blocking the emergency exit, that plaintiff should have initially sought assistance in attempting to push the buffet back into place, and that it was error for the Court to charge the emergency doctrine.

Perhaps the best answer to that argument was Judge Weinstein's reply to the objection made by Dobbs' counsel that there was no factual foundation for the emergency charge. Judge Weinstein stated (471a-472a):

"Of course, there is. The fact that an emergency exit was blocked, it was her duty as being in charge of stewardesses to immediately take action to unblock it. You never know in a plane like this, shortly after taking off, they may have to make an emergency landing. She may have to be strapped into her seat immediately during an emergency landing procedure, and if that exit was blocked, it could have been a disaster."

To that persuasive statement we add the additional practical consideration that the speed at which a jet travels

would have left little, if any, time in the event of an untoward incident for the attendants or crew to attempt to push the buffet back into place.

Additionally, it will be recalled that United's flight instructor (Schweizer) testified that it was left to an attendant's own discretion and judgment whether she should attempt to rectify the situation herself or seek help from the cockpit (305a-307a). We submit that the issue of whether plaintiff was reasonable in the exercise of that discretion was one for the jury and that it cannot be said, as defendant implicitly urges, that her actions constituted contributory negligence as a matter of law (cf. *Ware v. Alston*, 112 Ga. App. 627, 630, 145 S.E.2d 721, 725; *Rossman v. LaGrega*, 28 N.Y.2d 300, 308).

Dobbs' reliance on *Estes v. Town of Big Flats, Chemung County*, 41 A.D.2d 681, is misplaced. There plaintiff was injured when a car in which she was a passenger struck a bridge on Olcott Road in the Town of Big Flats.

The alleged cause of the accident was defendant's negligence in failing to provide proper warnings as to the condition of the road and the existence of the bridge. The Appellate Division reversed a judgment for plaintiff and ordered a new trial on two grounds, one of which was that plaintiff was not entitled to an emergency doctrine charge. The evidence merely showed that there was an oncoming vehicle some 500 feet ahead which was preparing to turn into a driveway about 150 feet from the bridge. That case is so factually disparate as to be completely inapposite.

POINT II

The amount of the verdict reflects a careful and correct consideration of the evidence by the jury. The verdict cannot be considered excessive by any fair standard.

Preliminary

The evidence hereinafter recited conclusively refutes Dobbs' argument that the verdict was excessive. It readily reveals (1) the severe injury sustained by plaintiff as the result of Dobbs' negligence, (2) the extended and extensive pain and suffering plaintiff has already undergone and may continue to undergo even if a fusion operation is ultimately performed, (3) the extended and extensive medical treatment already rendered to her and the probability of future medical treatment, and (4) a salary loss of approximately \$10,000.00 resulting from a fourteen month loss of work due to the accident.

Plaintiff's health preceding the accident

As already noted, plaintiff had been a United stewardess since April, 1969 (8a). She was in "very good health" up until the time of the accident (165a) and never had any previous problems or symptoms concerning her lower back region (21a).

She had been "very active" prior to the accident and regularly skied, played tennis and owned a small sailboat (167a).

Events following the accident

During the balance of the flight following the accident, she experienced "like a very bad backache" (144a). She worked the following day (April 24th) but her back continued to hurt and was "very stiff" (144a-145a). She also worked on April 25th but her back "was getting worse" as the day passed.

On April 26th she experienced difficulty getting out of bed and went to see the United Air Lines medical officer that day (23a, 146a). She was experiencing "pain and some numbness * * * running down into her left leg, the pain being in her back", "was unable to straighten up", "was bent forward" (23a). The medical officer gave her medication and told her to rest and report back before her next flight (146a).

Commencement of medical treatment by private physicians

Inasmuch as she had three or four days off prior to her next flight, she returned to her home town of New Milford, Connecticut (147a). She there consulted an orthopedic surgeon (Dr. Estrada) who diagnosed her condition as a sprain, prescribed medication and ordered complete bed rest (23a, 147a). She stayed with some friends and remained in bed for four weeks (147a). The pain in her back was then "worse" than at the time of the accident (147a). She was also experiencing a pins and needles sensation in her legs (148a).

She saw Dr. Estrada once a week during those four weeks and was an outpatient at New Milford Hospital where she underwent traction, heat treatment and massages for four days which helped "a little bit" (148a-149a).

**Plaintiff's attempt to
return to work**

She continued to have back problems and "couldn't lift as well or get about as well" (149a). For six days at the beginning of July, 1972 she worked in a United Air Lines office but had to return home because her back was bothering her "a lot" and she was unable to stand or sit for any length of time (149a-150a).

**Plaintiff's further
medical treatment**

She remained under Dr. Estrada's care until September, 1972 at which time her back was "still stiff" (150a). However, she felt well enough to return to work and, following a United physical that month, she returned to work in October, 1972 (151a). She worked until the end of November, 1972 but then had to discontinue because her back was bothering her to the point that she could not perform her duties aboard the aircraft (151a). She experienced trouble walking and had a "lot of pain" when bending (152a).

She then consulted another orthopedic surgeon (Dr. Graubard) in December, 1972 who informed her she had a slipped disc and advised her not to return to work (24a, 152a).

In January, 1973, while staying with a girl friend in Queens, she was sitting on a couch and discovered she could not get up or walk (153a-154a). She saw her friend's doctor (Dr. Lenemin) who prescribed a back brace (152a-153a). Her back was "severely painful" (153a). She became "completely bedridden" but after a time the brace helped a little (154a). When she did attempt to walk she was "almost over at a 90 degree angle" (154a).

She went to live with her parents near Rochester, New York where she was bedridden and in pain (154a-156a). After seeing three more doctors (156a-157a), she saw Dr. William Cotanch on May 5, 1973 who referred her to the Genesee Hospital (157a-158a). She was still wearing the brace and was in "a lot of pain" (158a). A myelogram was taken and on May 18, 1973 Dr. Cotanch performed a laminectomy to remove a herniated disc between the 4th and 5th lumbar vertebrae (31a, 30a, 159a-160a). The hospital record appears at pages 518a-547a of the joint appendix.

Events subsequent to the operation

Plaintiff had to "learn to walk all over again" (161a). She was unable to walk for a couple of months and stayed with her parents (162a-163a). She remained under Dr. Cotanch's care until some time in September, 1973 and returned to work in December, 1973 (164a). However, she requested and was granted work on smaller planes on which she would not have to push objects (31a-32a, 164a-165a). She had lost about fourteen months from work (174a). She was not paid for the lost time, her salary in 1972 being about \$700.00 a month (166a).

Since the operation there was not a single day when she was free of pain (170a). When she attempted to play tennis she felt a "nagging pain" (167a). She attempted to resume skiing but sustained "a lot of pain" and gave up any further attempts (168a-169a). She took her sail boat out once but found it "too much for [her] back and made no other attempt to use it (169a-170a). She has trouble with household chores (having married since the accident) and does no more gardening (6a, 171a-172a). When her menstrual period arrives, her back swells and her right leg goes numb (172a-173a).

Dr. Cotanch prescribed exercises which she does every day and during which she experiences "some pain" (173a).

Plaintiff was 28 at the time of trial and has a life expectancy of 49.9 years (500a).

Dr. Koven's testimony

Dr. Leo Koven was a diplomate of orthopedic surgery (19a). He conducted a physical examination of plaintiff on December 14, 1976 and, in order to do so, obtained a history from plaintiff of the accident, prior treatment, etc. The information he obtained was substantially as set forth above.

He found that she still had some numbness running into the right buttocks down her leg as far as the calf and that such episodes lasted about a week once a month (33a). She was taking Valium and muscle relaxants (33a). She had a 3½ inch scar on her lower back which was permanent (33a, 52a). She could not bend fully forward and any attempt to do so occurred in a "jerking" fashion which indicated to him "some mechanical disability" (34a).

He had her perform a test to stretch the sciatic nerve during which she experienced pain in her left leg which indicated "an impediment" (35a). On testing her reflexes her left knee jerk was diminished which confirmed the presence of some residual pressure on the fourth nerve root (35a).

On the basis of the history received from her, his physical examination and x-rays he took, he concluded that the accident of April 23, 1972 was the competent producing cause of the herniated disc (37a-38a, 74a-75a). Contrary to Dobbs' statement at page 8 of its brief, Dr. Koven did *not* testify at pages 75a-76a of the joint appendix or anywhere else that it was not foreseeable that a pushing episode would cause a herniated disc.

Dr. Koven was also of the opinion that there was evidence of an "ongoing disability or derangement in the lower portion of the back, which was also producing pressure on the nerve root" (38a-39a). He concluded that such condition was permanent but might be relieved by a fusion operation (39a). He then stated that without a fusion, plaintiff will continue to have pain and that, in any event, a fusion does not always relieve the remaining pressures on the nerve root (40a).

The foregoing evidence clearly justified the verdict in this case. Courts have long recognized that no precise rule can be formulated by which a factor such as pain and suffering can be accurately measured and compensated for in money. Before a court will interfere with a jury award in a personal injury action, the verdict must be "irrational or so high as to shock the judicial conscience" (*Batchkovsky v. Penn Cent. Co.*, 525 F.2d 1121, 1124 (2d Cir. 1975)). Clearly, the verdict in this case falls far short of that test and, accordingly, should not be disturbed.

In an attempted support of its excessiveness argument, Dobbs relies on *Ferrari v. Moore-McCormack Lines, Inc.*, 294 F. Supp. 1366. That case is clearly distinguishable and, in the language of this Court in *Batchowsky v. Penn Cent. Co.*, *supra* at p. 1125:

"* * * it illustrates the error frequently encountered in attempting to equate one personal injury award with another * * * the differentiating facts in each case with respect to pain and suffering, anticipated work life expectancy, permanency of disability and other relevant factors, limit the precedential value of a court's treatment of awards in other apparently similar cases."

Thus, while plaintiff seaman in the *Ferrari* case allegedly sustained a herniated disc in 1966, Judge Weinfeld pointed out that prior to the accident plaintiff had a degenerative osteoarthritic condition of the lumbosacral spine. The Court further noted (p. 1367) that he had "an extensive history of low back injuries related to accidents in 1953, 1955 and 1962, and a recurrence in 1956". Still further, the Court considered that in an earlier lawsuit plaintiff swore in an interrogatory that he had then sustained a slipped disc.

The record in the case at bar demonstrates that plaintiff had been in excellent health prior to this accident and had no prior back or spinal problem.

In *Ferrari* plaintiff was 55 years old at the time of trial and had a life expectancy of 18 years. In the instant case plaintiff was 28 years old at the time of trial and had a life expectancy of 49.9 years, for which period, according to the medical testimony, she would have a permanent disability accompanied by pain even though she could work.

We respectfully submit that the evidence of plaintiff's pain and suffering and other factors clearly entitled the jury to fix the award at \$170,000.00. Her recovery should not be dependent on the entirely different fact pattern of the *Ferrari* case which was decided some eight years ago before inflation and the cost of living sharply diluted the value of the dollar.

POINT III

The Court correctly allowed Dr. Koven to testify as to what plaintiff had told him concerning her medical history for the purpose of using that information, as well as the physical examination he conducted, to express his opinions.

Rules 803(4) and 805 of the Federal Rules of Evidence are dispositive of the argument made by Dobbs in Point II of its brief. Rule 803(4) provides that the following are not excluded by the hearsay rule, even though the declarant is available as a witness:

“Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.”

Rule 805 provides:

“Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.”

Thus, the testimony objected to was admissible under the quoted rules.

Moreover, when the objection by Dobbs' counsel to the testimony was overruled, the Court immediately rendered the following precautionary instruction (20):

“You understand that what he received from the patient depends upon the patient's credibility.

He is basing his testimony on that, so that if you don't believe what the patient told the doctor, which is hearsay, you will have to evaluate the doctor's opinion in the light of that last testimony."

CONCLUSION

The judgment appealed from should be affirmed.

Dated: July 19, 1977

Respectfully submitted,

LIPSIG, SULLIVAN, MOLLEN & LIAPAKIS, P.C.
Attorneys for Plaintiff-Appellee

PAMELA ANAGNOS LIAPAKIS,
Of Counsel

Service of three (3) copies of

the within.

hereby admitted this

of

197

Attorney for

Service of three (3) copies of

the within

is

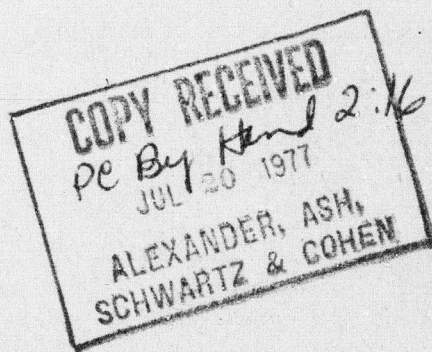
hereby admitted this

day

of

, 197

Attorney for



1977 JUL 20 PM 12:28
MAIGHT, GARDNER, POOR & HAVENS
MANAGING ATTORNEYS OFFICE
COPY RECEIVED BY
two copies